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CONTRACT WITH MUNICIPAL CORPORATION, COST OF WORK INCREASED BY ACT OF MUNICIPALITY.—In the case of *Horgan* v. *Mayor*, etc., 55 N. E. Rep. 204, 206, 1899, citing *Messenger* v. *City of Buffalo*, 21 N. Y. 196, 1860, and *Mulholland* v. *Mayor*, etc., 113 N. Y. 631, 1889, the facts were as follows:

"The plaintiff . . . entered into a contract in writing with the city of New York to furnish . . . all the necessary materials and labor, and excavate, remove and dispose of all silt, sediment and other materials deposited in the bottom of the pond . . . and construct a concrete bottom over same. . . . Plaintiff seeks to recover in this action for extra work under the contract. . . .

"The sheet of water known as the 'Pond' is a small lake in Central Park. . . . The pond had an outlet consisting of a cir-

cular gate twenty inches in diameter, resting on the bottom, and connecting by pipe with one of the city sewers. There was also an overflow basin about twenty-five feet from the gate, and five or six feet higher, which also led to one of the city's sewers. . . . Subdivision 1 [of the contract] provides that plaintiff shall furnish 'all labor and materials required for conducting the flow and draining off the water from the bottom during the prosecution of the work.' Subdivision 2 states that plaintiff shall furnish 'all labor and materials required for conducting the flow of water thro' or across the area of the pond, or any portion thereof, and all pumping or bailing or other work required.' Subdivision 5 requires plaintiff to provide 'all labor and materials required for conducting the flow of water thro' or across the area of the pond to the outlet, or for draining water from any portion of the area, and all pumping or bailing required for the proper prosecution of the work during its progress and until its completion.' Subdivision 33 reads as follows: 'all loss or damage arising out of the nature of the work to be done under this agreement, or *from any unforeseen obstruction or difficulties* which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances on the line of the work, or from any act or omission on the part of the contractor or any person or agent employed by him, not authorized by this agreement, shall be sustained by the said contractor.' In the blank form of proposals for estimates under which the plaintiff made his bid is this provision: 'Bidders must satisfy themselves by personal examination of the location of the proposed work, and by such other means as they may prefer, as to the accuracy of the . . . estimate, and shall not at any time after the submission of an estimate dispute or complain of such statement . . . , nor assert that there was any misunderstanding in regard to the nature or amount of the work to be done.' . . . It was proved at the trial that the plaintiff made the personal examination of the location of the proposed work as required. Shortly after the contract was executed the plaintiff requested the proper city authorities to draw off the water from the pond, and thereupon the circular gate, twenty inches in diameter . . . as already described, was opened, and the water was drawn down to a depth of fourteen inches, when the outlet-pipe ceased to work. An examination disclosed that the pipe or sewer was very seriously obstructed and unless the same was cleared out no further water could be drawn from the pond." . . .

Bartlett, J. in delivering the opinion of the court said "The question that lies at the threshold of this case is, did the city owe the duty to the plaintiff of having the outlet pipe of this pond in working order? . . .

Without answering this question or further considering the point raised, he proceeds: "A fair construction of the contract on this point authorized the contractor to assume that the pond could be drained of water, in a general sense. . . . The contract did not contemplate the contractor pumping out the water of the lake, in a general sense. . . . It was proper for plaintiff to assume that the water of the lake could be discharged into the sewer thro' the outlet

the city had constructed for that purpose. This construction of the contract falls within the familiar rule: 'The meaning of a contract is to be gathered from a consideration of all its provisions, and the influences naturally derivable therefrom, as to the intent and object of the parties in making it and the result which they intended to accomplish by its performance.'" . . .

"The additional point is taken on behalf of the city that, even if the contract should be construed as we have indicated, nevertheless the plaintiff has waived all claim for extra work by reason of subdivision 33 of the specifications." [see above.]

"When this provision is reasonably construed, it does not operate against the plaintiff as contended. It must be held to apply to the work to be done, and the unforeseen obstructions or difficulties which may be encountered *under the agreement*. The unforeseen obstruction that was encountered, and that subjected this plaintiff to a large amount of extra work, was entirely *outside the contract*, and stands unaffected by this provision."

If such an occurrence as this is "outside the contract," we should like to know what things can be included in a contract. Surely, the language of Sec. 33 is comprehensive enough to include this. In a sense, the stopping up of a drain was not a contingency provided for by the terms of the contract, because it was not expressly mentioned. But it would seem, in another and more obvious sense, to be within the contract, as it is expressly stipulated that "all loss . . . arising . . . from any unforeseen obstruction or difficulties . . . shall be sustained by said contractor." We are unable to follow the logic of the learned judge to the effect that the saving clause does not apply because the contractor, in assuming an obligation to cover the bottom of the pond with concrete and impliedly also to dispose of all the water in the pond, did not consider that the normal method of draining it off might fail. In other words, it is incomprehensible that a man can declare his liability for the consequences of an unforeseen contingency and then, when the contingency occurs, seek discharge because he did not foresee it.

Apropos of this, we would invite attention to a recent utterance of the Supreme Court of the United States. ". . . It may be well, to briefly recall certain well-settled rules in this branch of the law. One is that if a party by his contract charge himself with an obligation possible to be performed, he must make it good unless his performance is rendered impossible by the act of God, the law, or the other party. *Difficulties, even if unforeseen,* and however great will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none, nor, in such circumstances, can equity interpose." Shiras, J., in *United States* v. *Gleason*, Oct. 1899 (not yet reported).

It only remains to add that the decision of *Horgan* v. *the Mayor* was rendered by a divided court and overruled both decisions in the lower courts.

Compare this case with *Fresno Milling Co.* v. *Fresno Canal Co.*, 59 Pac. 141, digested in A. L. R. for March, 1900, at p. 177.